

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 516 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL
and
Hon'ble MR.JUSTICE RAVI R. TRIPATHI

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

INDO NIPPON FILAMENTS THROUGH AUTHORIZED OFFICER
Versus
UNION OF INDIA

Appearance:
MR BHARAT T RAO for Petitioner

CORAM : MR.JUSTICE B.C.PATEL
and
MR.JUSTICE RAVI R. TRIPATHI

Date of decision: 22/01/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE B.C.PATEL)

The petitioner has filed this petition for several reliefs as set out in prayer clauses (a) to (e)

of paragraph 23 of the petition. It is contended that though the application in the prescribed form has been forwarded to the authority exercising the powers under Kar Vivad Samadhan Scheme 1998 ("KVSS" for short) vide Annexure-E dated 27.1.1999, the Commissioner of Central Excise, Surat-I, has not responded to the declaration made under KVSS. The learned counsel further submitted that in view of the clauses 90 of KVSS, it was the duty of the designated authority to examine the application form within 60 days from the date of receipt of declaration, and, the designated authority was required to make an order determining the amount payable by the declarant in accordance with the provisions of the Scheme. It was further submitted that a certificate was also required to be issued in such form as has been prescribed setting forth therein the particulars of the tax in arrears and sum payable after such determination towards full and final settlement of tax arrears. The learned counsel submitted that the declaration was forwarded on 27.01.1999 yet, no action has been taken and therefore the Court should issue appropriate directions directing the designated authority to decide the declaration.

2 The short facts are required to be narrated in the instant case. The petitioner's premises was searched for which a panchnama was drawn on 26.5.1997, a copy of which is produced at Annexure-A to the petition. In the panchnama the panchas have stated as under:-

"We, (the above-named Panchas) have read this Panchnama and agree with it that whatever is written in it is as per our version. After satisfaction of ourselves, we put our signature on this Panchnama."

3 During the course of the panchanama it appears that on behalf of the petitioner one Shri Bachkaniwala was present and he made certain statements which were recorded in the panchanama as under:- (Each page of the panchnama bears the signature of learned Advocate stating that the copy is a true copy)

"Shri Bachkaniwala states that they get their assessable value after showing the deductions of Trade Discount, Transportation, Insurance and Octroi in the Column No.5 of the C. Ex. Invoice, and whatever shown as deduction in the column no.5 they charge us PME (sic) from the buyers. Further, Shri Bachkiwala, records regarding Trade discount that it is nothing but

brokerage which they charge from the Buyers. Shri Bachkaniwala states that the deduction in the Column No.5 and charging as PME from the Buyers is to evade the C.Ex. duty. Shri Bachkaniwala agrees that their recovery as PME is liable for payment of C. Ex. duty which comes to Rs.13,56,804/- as shown in Annexure-C to this panchnama. The Shri Bachkaniwala from their Computer which is total amounting to Rs.27,50,358/-." (sic)

"... Shri Bachkaniwala, Director of the said unit confess his offence of undervaluation and improper payment of C. Ex. duty under C. Ex. Act/Laws. He agrees to pay the differential short paid C. Ex. duty amounting to Rs.93,87,370/- (80,30,566/- + 13,56,804/-). Shri Bachkaniwala pays Rs.40,00,000/- in token of his commitment to pay total Rs.93,87,370/-. Details of payment of Rs.40,00,000/- made through Cheques are as under:-

Sl.No.	Cheque No.	& Date	Payable on	Rs.
1	0251351	dt. 5/4/97	Bank of Baroda Parsi Sheri Branch Surat	10,00,000
2	0251352	dt.10/4/97	-do-	10,00,000
3	0251353	dt.20/4/97	-do-	10,00,000
4	0251354	dt.30/4/97	-do-	10,00,000
Total				Rs40,00,000

"He agrees to pay remaining amount of Rs.53,87,370/- (93,87,370/- - 40,00,000/-) within a short period. Shri Bachkaniwala, Director of the Factory, remain present during the course of this Panchanama."

4 Learned advocate Mr Rao appearing for the petitioner submitted that the petitioner agreed that he is liable to make the payment, then, in that case when the declaration was submitted claiming benefit for the remaining amount, the designated authority ought to have not only entertained the declaration but ought to have

accepted the declaration as per scheme and ought to have made an order as prayed.

5 Sub-clause (m) of Section 87 of KVSS defines "tax arrears". Clause (2) being relevant along with sub-clauses is reproduced as under:-

"(m) 'tax arrear' means -

(i) in relation to direct tax enactment, the amount of tax, penalty or interest determined on or before the 31st day of March, 1998 under that enactment in respect of an assessment year as modified in consequence of giving effect to an appellate order but remaining unpaid on the date of declaration,

"ii) in relation to indirect tax enactment, -

(a) the amount of duties (including drawback of duty, credit of duty or any amount representing duty), cesses, interest, fine or penalty determined as due or payable under that enactment as on the 31st day of March, 1998 but remaining unpaid as on the date of making a declaration under section 88, or

(b) the amount of duties (including drawback of duty, credit of duty or any amount representing duty), cesses, interest, fine or penalty which constitutes the subject matter of a demand notice or a show-cause notice issued on or before 31st day of March, 1998 under that enactment but remaining unpaid on the date of making a declaration under section 88, but does not include any demand relating to erroneous refund and where a show-cause notice is issued to the declarant in respect of seizure of goods and demand of duties, the tax arrear shall not include the duties on such duties on the seized goods have not been quantified.

Explanation:-

Where a declarant has already paid either

voluntarily or under protest, any amount of duties, cesses, interest, fine or penalty specified in this sub-clause, on or before the date of making a declaration by him under section 88 which includes any deposit made by him pending any appeal or in pursuance of a court order in relation to such duties, cesses, interest, fine or penalty, such payment shall not be deemed to be the amount unpaid for the purposes of determining tax arrear under this sub-clause."

6 Mr Rao further submitted that in the instant case in the panchnama itself it was determined as to what is due or payable under the enactment and therefore it was obligatory on the part of the designated authority to accept the declaration.

7 What is required to be noted in this case is the date specified in the sub-clause (2) and, being a crucial date we put a pointed question to the advocate as to whether there was any decision rendered so as to say that the amount was due or payable under the enactment as on 31st March 1998 and that has remained unpaid on the said date i.e. on the date of declaration. The learned counsel submitted that it is not necessary that there should be any determination of the amount which may be due or payable under the enactment. According to the learned counsel even if the raid is carried out and the person voluntarily makes a statement that he is liable to make payment, then accepting that statement as if the amount is due and payable, the designated authority ought to have considered the declaration and ought to have made the order. The learned counsel, Mr Rao, further submitted that in view of the decision of ALL INDIA FEDERATION OF TAX PRACTITIONERS V. UNION OF INDIA reported in 1998 (104) ELT 595 (Delhi) the Court should direct the designated authority to consider the application. The learned counsel read the aforementioned judgement and submitted that the petition must be admitted. He puts emphasis on para 19 and 22 of the said judgement, which, we reproduce as under:-

"19. The main plank of attack is that the scheme places an honest and peace loving assessee in a position more worse than a dishonest and/or belligerent assessee. It was submitted that an honest and peace-loving assessee though disputing his liability to pay the tax still makes the payment but continues his legal battle in the

hope of succeeding in a manner known to law, planking his hopes on a favourable decision by a Tribunal or Court. On the other hand, an unscrupulous assessee plays every possible card in his deck to resist the demand for payment of tax and so he continues to be in arrears and succumbs to pressure of the department which is after enforcing the recovery. He does not wish to face the attachment etc. as coercive process for recovery always creates an unpleasant situation for the assessee. So also, an assessee who had paid surplus tax to the Department and who could not or did not post haste realise his dues from the department also suffers denial of the benefit of the scheme because his tax arrears are adjusted by the department out of the amount of refund due to him.

"22. The validity of classification has to be decided and judged in the light of the object sought to be achieved. The objective is two fold. While judging the validity of the classification we have to keep both the limbs of the object in view. The learned ASG has very rightly pointed out that allowing the benefit of the scheme to such litigating assessees from whom the Revenue has succeeded in effecting recovery even by adopting coercive methods or by making adjustments would have been destructive of the very objective sought to be achieved. It is immaterial whether the tax was paid voluntarily by the assessee or realised involuntarily by the Department resorting to coercive means of recovery or by making adjustment; the fact remains that the assessee ceases to be in arrears. By giving benefit of the scheme to such class of assessees the Revenue does not stand to gain anything rather it stand to lose inasmuch as what has been realised shall have to be refunded. In our opinion, the basis of classification adopted by the scheme to this extent is guided by the objective sought to be achieved by the legislation and therefore cannot be held to be arbitrary or unreasonable."

In that case the Court examined the term "arrear" and whether it should be given a narrow and a too rigid meaning. In paragraph 25 the Court considered the aspect which is as under:-

"25. The abovesaid submission puts a narrow and too rigid a meaning on "arrears" which does not fit in the context. The term "arrear" means an amount or quantity which still needs to be paid. It refers to money that is owed. Wharton's Law Lexicon (Fourteenth Edition) defines "arrears" to mean - "money unpaid at the due time; as sent behind; money in the hands of an accounting party." It is true that 'tax arrears' has been defined as the amount of tax, penalty or interest "determined" on or before 31.3.1998 under Clause (m) of Section 87. Still it cannot be denied in the illustration given herein above that at one point of time the tax was determined though such determination was reversed in appeal by the Commissioner (Appeals). The determination is sought to be restored in the appeal preferred by the Department before the Tribunal. Once the appeal is allowed, the determination would relate back to the date of original the same. Under the scheme of Income Tax. (sic) It is well known that a determination of liability to pay tax does not necessarily call for an order of adjudication. Take the cases of self-assessment, payment of advance tax, deduction of tax at source and so on. Several provisions prescribe for penalty or interest which liability is incurred automatically and by operation of law even when an order of adjudication has not been made though there may be need for quantification which may be a mathematical exercise merely. The provision of Section 90(1) throws light on this aspect. On declaration being made, the designated authority shall determine the amount payable by the declarant. The previous determination; which is sought to be restored in appeal by Department may be finalised by the designated authority."

8 The Court expressed an opinion in para 26, "In our opinion, no sub-classification can therefore, be made in the class of litigating assessee in arrears merely by reference to the fact whether they are prosecuting the litigation or defending themselves. In our opinion, once a liability to pay the tax was incurred and determined on or before 31.3.1998, the assessee would be treated to be in arrears inspite of his having succeeded at one stage of litigation if the Revenue has chosen to continue with litigation."

In para 33 the Court pointed out as under:-

"33. To sum up our conclusions are: (1) The proviso to Section 92 is ultra vires Article 14 of the Constitution as it results into creating two artificial classes between the same class of assesseees i.e. the litigating assesseees in arrears; (2) The definition of "tax arrears" in Clause (m) of Section 87 should be so read as to mean the amount of tax, penalty or interest determined by any competent authority on or before 31.3.1998 though such determination might have been set aside at a later stage if such setting aside has not been accepted by the Department and continues to remain under challenge before a Court or Tribunal: (3) The rest of the Scheme is intra vires the Constitution."

9 Therefore, in view of what we have indicated hereinabove, there is no substance in the submission made by the learned advocate. In the instant case, during the panchnama he made some statement and he paid some amount by way of cheque which has been realised later on. That cannot be termed as determination of duty payable.

10 It is surprising to note that in the instant case vide Annexure-D a show-cause notice has been issued for the first time. The show-cause notice is in detail. We are not referring to the details of the show-cause notice as it may be understood by one or the other side that the Court has expressed its opinion. In our opinion, clause 95 of KVSS is a clear answer to the arguments advanced by the learned counsel for the petitioner. The relevant clause reads as under:-

"95. The provisions of this Scheme shall not apply -

(ii) in respect of tax arrear under any indirect tax enactment, --

(a) in a case where prosecution for any offence punishable under any provisions of any indirect tax enactment has been instituted on or before the date of filing of the declaration under section 88, in respect of any tax arrear in respect of such case under such indirect tax enactment;

(b) in a case where show-cause notice or a

notice of demand under any indirect tax enactment has not been issued;

(c) in a case where no appeal or reference or writ petition is admitted and pending before any appellate authority or High Court or the Supreme Court or no, application for revision is pending before the Central Government on the date of declaration made under section 88;

11 Thus, in the instant case there was neither show-cause notice nor there was a notice of demand and therefore the scheme itself was not applicable and therefore question of entertaining the declaration does not arise and in our view this petition is misconceived and the petition is required to be rejected and the same is rejected with costs of Rs.10,000/- which shall be transmitted to the State exchequer.

12 The learned counsel for the petitioner submitted that he may be permitted to challenge the vires of clause 95. We have considered the decision of the Division Bench of the Delhi High Court. However, we are not possessed with the business to decide matters wherein vires of said Section is challenged and therefore it would be open for the petitioner to challenge the same.

(B C Patel, J.)

(Ravi R Tripathi, J.)
(mohd)